NO. **1032412**

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
ROBERT MCBRIDE,
Petitioner / Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE KATHERINE L. SVOBODA, JUDGE

STATE'S ANSWER TO PETITION FOR REVIEW

NORMA J. TILLOTSON
Prosecuting Attorney
for Grays Harbor County

BY: 

WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA # 15489

OFFICE AND POST OFFICE ADDRESS
Grays Harbor County Prosecuting Attorney
102 West Broadway Room 102
Montesano, WA 98563
(360) 249-3951

T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

COUNTERSTATEMENT OF THE CASE

For the most part Petitioner has accurately and sufficiently set forth the factual and procedural history of this case in his petition for review. There are just a few facts the State wishes to emphasize.

Mr. McBride's sister, Stephanie, dropped him off at the home of their stepfather (and the site of the arson), Loren Richards, to spend the night. 09/20/22 RP 14-15. She "hung out" for a little while before leaving, and Mr. McBride and Mr. Richards were getting along "good," with "no harsh words or resentments." 09/20/22 RP 20. Neither Ms. McBride nor Mr. Richards ever testified that the Appellant appeared to be in distress or under the influence.

No one witnessed Mr. McBride set the truck on fire, and his demeanor and whether he was under the influence of drugs at the time he set the fire is unknown.

One of the civilian witnesses who had stopped to assist Mr. McBride testified that Mr. McBride kept saying that he had taken fentanyl and that he was dying. 09/20/22 RP 77. He was able to tell Deputy Ramirez who responded to the scene that he had taken an ounce of fentanyl. 09/20/22 RP 112. Prior to the arrival of law enforcement, once Mr. McBride got into the back seat of Mr. McKinnon and Mr. Coutts' vehicle he calmed down, 09/20/22 RP 103, and he told Mr. McKinnon and Mr. Coutts several times that he needed help and asked to be taken to the hospital. 09/20/22 RP 90, 97, 103.

Mr. McBride was interviewed by Deputy Welter the next day at the Grays Harbor County Jail. He confessed to burning the truck. 09/20/22 RP 119-121.

No evidence was presented nor testimony elicited about the possible effects fentanyl may have had on Mr. McBride's ability to form the requisite mens rea for arson, defense counsel's argument that he was "high" on fentanyl

notwithstanding. 09/21/22 RP 154. No blood draw, urinalysis or other test was performed to see what types of drugs, if any, Mr. McBride may have ingested.

ACCEPTANCE OF REVIEW

Petitioner seeks review under RAP 13.4(b)(2), alleging that the decision below conflicts with other published decisions of the Court of Appeals, specifically *State v. Kruger,* 116 Wn. App. 685, 67 P.3d 1147 (2003), and *State v. Walters,* 162 Wn. App. 74, 255 P.3d 835 (2011), and that this case presents a significant constitutional question under the state or federal constitution. RAP 13.4(b)(3).

This petition fails under both considerations.

ARGUMENT

1. This Court should decline to accept review. Appellant's claim of ineffective assistance of counsel is without merit because on the facts below he cannot show that defense counsel's representation was deficient or that there is a reasonable probability that but for the alleged error the result of the proceeding would have been different. Furthermore, the law in this area is well settled and does not present a significant question under the state or federal constitution.

Mr. McBride argues that his trial counsel provided ineffective assistance by not requesting an instruction on voluntary intoxication. He does not challenge the sufficiency of the evidence, the jury instructions, nor make any other challenge to his conviction.

The voluntary intoxication instruction is set forth in WPIC 18.10, and an instruction in this case would read as follows:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, in determining whether the defendant acted with intent, evidence of intoxication may be considered.

Voluntary intoxication is not a complete defense to a crime, and does not excuse the criminality of the act, but allows the jury in the first instance to consider whether the defendant was able to form a particular mental state. *State v. Stacy*, 181 Wn. App. 553, 569, 326 P.3d 136 (2014).

Claims of ineffective assistance of counsel, as well as instructional errors, are reviewed de novo. *State v. Backemeyer*, 5 Wn. App. 2d 841, 428 P.3d 266 (2018) (ineffective assistance); *State v. Harris*, 164 Wn. App. 377, 263 P.3d 1276 (2011).

"To prevail on a claim of ineffective assistance of counsel, [the defendant] must establish both deficient performance and prejudice." *State v. Jones*, 183 Wn.2d 327, 330, 352 P.3d 776 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

"Deficient performance is performance falling 'below an objective standard of reasonableness based on consideration of

all the circumstances.'" *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Appellate courts are highly deferential to the performance of counsel in evaluating the reasonableness of their actions. *State v. Crawford,* 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). "There is a strong presumption that trial counsel's representation was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions." *State v. McNeal,* 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Whether counsel's performance was ineffective depends on the facts of the case, requiring a case by case analysis. *State v. Cienfuegos,* 144 Wn.2d 222, 229, 25 P.3d 1011 (2001).

Deficient performance prejudices a defendant when a "substantial" likelihood of a different outcome exists; it is not enough for a different outcome to be merely "conceivable." *In re Pers. Restraint of Lui,* 188 Wn.2d 525, 538-39, 397 P.3d 90

(2017). There must be a reasonable probability (a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cienfuegos,* 144 Wn.2d at 229. If a defendant fails to satisfy showing deficient performance or prejudice, the inquiry ends. *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

a. This Court should decline to accept review because, based on the evidence produced at trial, Petitioner was not entitled to an instruction on involuntary intoxication and thus it was not ineffective assistance for defense counsel not to request the instruction.

To prevail on an ineffective assistance of counsel claim for failure to request an instruction an appellant must show that the trial court would have given the instruction if requested. *In re Pers. Restraint of Cross,* 180 Wn.2d 664, 718, 327 P.3d 660

(2014). As the court held in *State v. Kruger,* 116 Wn. App. at 690-91, (emphasis in the original):

> We first determine whether the defendant was entitled to the instruction – voluntary intoxication. *See State v. King,* 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (counsel not ineffective for failing to present a defense not warranted by the facts). We next decide whether it was appropriate *not* to ask for the instruction. *See State v. McFarland,* 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) (requiring defendant to show absence of legitimate strategic or tactical rationales for challenged attorney conduct). Finally, we must decide whether he was prejudiced. *See State v. Cienfuegos,* 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001) (rejecting argument that failure to propose an instruction to which defendant was entitled under the law constitutes per se ineffective assistance of counsel).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of consumption of the drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *See Kruger,* 116 Wn. App. at 691. The evidence must

reasonably and logically connect the defendant's impairment and the asserted inability to form the requisite level of culpability to commit the crime charged. *State v. Gabryschak,* 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996) (citing *State v. Griffin*, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983)). Evidence of drinking or use alone is insufficient to warrant the instruction; rather, there must be "evidence of the effects of [the drugs] on the defendant's mind or body." *Id.* at 253 (quoting *Safeco Ins. Co. v. McGrath,* 63 Wn. App. 170, 179, 817 P.2d 861 (1991), *review denied,* 118 Wn.2d 1010 (1992)).

"Simply showing that someone has been drinking is not enough. The evidence must show the effects of the alcohol:

> Intoxication is not an all-or-nothing proposition. *A person can be intoxicated and still be able to form the requisite mental state,* or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state."

Kruger at 692 (citing *Gabryschak* at 254) (emphasis added).

In *Gabryschak, supra,* officers were sent to Gabryschak's mother's apartment in response to reported yelling. He refused to let the officers into the apartment and tried to run while being escorted to the police car. *Gabryschak,* 83 Wn. App. at 251, 254-55. Gabryschak was later charged with, among other things, malicious mischief in the third degree. *Id.* at 252. At trial, the testimony from the officers and from Gabryschak's mother was that Gabryschak was very intoxicated, had had a couple of drinks and was too drunk to drive. *Id.* at 253. On appeal, the court held that "[a] person can be intoxicated and still be able to form the requisite mental state." *Id.* at 254. Because the facts at trial indicated that Gabryschak understood the situation with the police, the court concluded that the trial court did not err in rejecting the request for a voluntary intoxication instruction. *Id.* at 255.

In *State v. Walters,* 162 Wn. App. 74, 255 P.3d 835 (2011), Mr. Walters arrived at a bar in Ritzville (where he was

formally the manager) at about 6:00 p.m. and stayed until about 1:30 a.m. During that time, he drank at least seven beers and two other shots of alcohol. The bartender would later rate his level of intoxication as four on a scale of one to ten; two police officers put his level of intoxication between four and six. *Walters*, 162 Wn. App. at 78.

After Walters left the bar, Ritzville Police Sergeant Bartz, investigating a burglary, encountered him in an alley at about 2:15 a.m. *Id.* at 78, 83. The officer noted that Walters was holding a set of keys on a square key ring attached to a green carabiner, which Walters put in his left pocket, *Id.* at 78, and that he had slurred speech, droopy, bloodshot eyes and that he swayed back and forth. *Id.* at 83. Shortly after Walters left the bar, the bartender discovered that the bar keys (on a square key ring attached to a green carabiner) were missing and reported the missing keys to police; a description of the missing keys was broadcast by dispatch. *Id.* at 78-79.

Sergeant Bartz heard the broadcast and recalled his encounter with Walters. Walters operated an arcade near the bar and Sergeant Bartz went to the arcade. He looked through the window and saw Walters sleeping on the floor under an air hockey table. *Id.* at 79. He tapped on the window and Walters let him in. Sergeant Bartz told him why he was there. Walters denied having the keys; however, while he was talking to Sergeant Bartz he put his hand in his left pocket and jiggled the key ring. Sergeant Bartz retrieved the keys from Mr. Walters' pocket while placing him under arrest. *Id.* Walters cursed the sergeant and resisted arrest. Sergeant Bartz had to use his stun gun on Walters twice and called for backup. After the second officer arrived, the two of them were able to gain compliance and place Mr. Walters in the patrol car. At the jail, Walters continued to resist the officers and kicked one of them. *Id.*

Walters was charged with third degree assault, third degree theft and resisting arrest. Mr. Walters testified that he

"did not remember leaving the bar and had little memory of interacting with the officers." *Id.* The defense requested a voluntary intoxication instruction but the trial court declined to give one, believing that such an instruction would lead the jury to speculate about Mr. Walters' mental state. *Id.* Nevertheless, in closing the parties argued whether or not Walters was too intoxicated to act intentionally. *Id.* at 84. Walters was convicted as charged. *Id.* at 79.

On appeal, the court found that the first two elements required to give a voluntary intoxication defense had been met: all three charges had a requisite mental state (intent) and there was a showing of alcohol consumption and its effect on the drinker. *Id.* at 82. "While the degree of intoxication was in dispute, there was no question but that Mr. Walters had consumed at least nine drinks over the course of the evening and they had affected him." *Id.* at 82-83.

As for the third element, whether his intoxication affected Mr. Walters' ability to act with intent, the court termed it "problematic" and presenting a "close fact pattern because there is no direct evidence that intoxication affected Mr. Walters' mental state." *Id.* at 83. Ultimately, the court concluded that there was sufficient evidence of intoxication to merit the giving of the instruction and that the trial court's refusal to give the instruction was error. *Id.*

The court then went on to consider if the refusal to give the instruction was harmless. "Instructional error is presumed prejudicial but can be shown to be harmless." *Id.* at 84 (citing *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)). "A nonconstitutional [sic] error such as this one is harmless if it did not, within reasonable probability, materially affect the verdict." *Id.* (citing *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986)).

As to the theft conviction, we cannot find the error harmless. The third degree theft conviction is reversed, and the case is remanded for a new trial.

The other two convictions are differently situated. Those crimes were committed well after Mr. Walters left the bar and, presumably, he had begun to sober up some. More importantly, there is direct evidence that his mental state was not impaired. The assault was committed at the jail while officers were trying to book Mr. Walters into custody. *He announced that he was going to kick Officer Cameron before he did so. In that circumstance, the failure to give the intoxication instruction was harmless error because there was no question but that Mr. Walters was acting intentionally.*

Similarly, the evidence shows that he intentionally resisted arrest. Where he had been cooperating with the officer initially, his attitude changed when the keys were seized and he was arrested. A struggle ensued, a stun gun was repeatedly employed, and a second officer had to be called in to take Mr. Walters away. His resistive behavior continued at the jail, right up to the point where he announced his intention to kick the officer. *At trial, Mr. Walter even admitted that he resisted arrest. In light of the evidence and the trial testimony, the intoxication instruction would not have affected the verdict.*

The lack of an intoxication instruction was harmless error on the assault and resisting arrest instructions.

Walters at 84-85 (emphasis added).

The crime of arson in the second degree requires that a person act knowingly and maliciously. WPIC 80.06; instruction no. 7; CP 28. "A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he is aware of that fact, circumstance or result. It is not necessary that the person know that the fat circumstance or result is defined by law as being unlawful or an element of a crime. If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact." WPIC 10.02; instruction no. 8; CP 28. "Malice and maliciously mean an evil intent, wish or design to vex, annoy or injure another person. Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another." WPIC 2.13; instruction no. 9; CP 28-29. Thus, the first requirement for the giving of a voluntary

intoxication instruction is met: a mental state. *Kruger,* 116 Wn. App. at 691.

There is also "some" evidence of Appellant's drug use based upon his claim that he ingested fentanyl. However, no blood draw or urine sample was obtained from the Appellant to confirm this fact.

However, there must be evidence that the drug use affected Appellant's ability to form the requisite intent or mental state. *Id.* In this case that evidence is lacking.

In *Gabryschak, supra,* the court held that an intoxicated and angry man was not entitled to a voluntary intoxication instruction where there was no sign of alcohol's impact on his reasoning abilities. *Gabryschak*, 83 Wn. App. at 253. Furthermore, Gabryschak ran from the deputies, which indicated he was aware that he was under arrest (similar to Appellant). *Id.* at 254-55.

Compare the facts in *Gabryschak* to those in *Kruger, supra*. Kruger showed at an acquaintance's house drunk and acting "obnoxious and rude." *Kruger*, 116 Wn. App. at 688. When an officer showed up and tried to speak with him Kruger swung a beer bottle at him. *Id.* at 688-89. Pepper spray had little effect on Kruger and, once at the jail, he began vomiting." *Id.* at 689, 692. Kruger was charged with third degree assault but his defense counsel did not request a voluntary intoxication instruction. On appeal, the court concluded that Kruger was entitled to such an instruction because there was "ample evidence of his level of intoxication on both his mind and body." *Id.* at 692. Kruger was physically ill, he experienced a "blackout", and compliance techniques "had little effect," which "is usually the case when one is highly intoxicated." *Id.* at 689, 692. *See also State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982) (two day drinking binge; defendant had glassy eyes and slurred speech, and ate a spider while washing it down with

whiskey); and *State v. Jones*, 95 Wn.2d 616, 622, 628 P.2d 472 (1981) (defendant with glassy eyes and slurred speech placed in "drunk tank").

b. This Court should decline to accept review because there was no competent evidence produced at trial to show how Petitioner's alleged ingestion of fentanyl would have affected, or interfered with, his ability to form the requisite mens rea. Furthermore, the decision below is consistent with, and not in conflict with, *State v. Kruger* and *State v. Walters*.

Petitioner cites *Kruger* for the proposition that "[t]here is no need for expert testimony regarding intoxication." Petition, p. 13, citing *Kruger* at 692-93. But *Kruger* does not support petitioner's position. *Kruger* specifically addressed *alcohol:* "'certainly *the effects of alcohol upon people are commonly known and all persons can be presumed to draw reasonable inferences therefrom.*'" *Kruger* at 693 (quoting *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985)) (emphasis added).

However, Washington courts have recognized that proof of drug intoxication is different from proof of alcohol intoxication. The Court of Appeals addressed this issue in *State v. Classen,* 4 Wn. App. 2d 520, 422 P.3d 489 (2018). In *Classen*, the defendant presented evidence of unusual behavior and the defendant claimed to have no memory of the behavior that resulted in his being charged. *Classen* at 528-29, 537. He claimed to have been using heroin and methamphetamine on a daily basis. *Id.* at 535. One of the responding officers testified that, based upon his training and experience, Classen appeared to be under the influence, but he could not say of what drug. *Id.* at 529. On appeal, Classen argued that his defense counsel was ineffective by not requesting a voluntary intoxication instruction. *Id.* at 534-35. The Court of Appeals rejected that argument (although it reversed in part on other grounds). The court held that as the effects of drug intoxication are not within the jury's common knowledge, and as no evidence was

presented as to how the drugs Mr. Classen took affected his ability to form the requisite mens rea, he was not entitled to a voluntary intoxication instruction and, accordingly, his defense attorney was not ineffective for not requesting such an instruction. *Id.* at 537-38.

> It is not necessary to present expert testimony to support an involuntary intoxication defense based on alcohol intoxication. This is because "[t]he effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol abuse." The case law does not say the same thing about methamphetamine or heroin intoxication. *Thus, competent evidence that methamphetamine or heroin affected Classen's ability to form the requisite mental state was required in this case.*

Classen at 537 (emphasis added).

The same is no less true of fentanyl. Thus, the decision below is not in conflict with either *Kruger* or *Walters.* Both *Kruger* and *Walters* involved the consumption of alcohol (not drugs), the effects of which are "commonly known." *Classen, supra.* The defendants in *Kruger* and *Walters* were both under

the influence of alcohol, as recounted by witnesses, when they committed their crimes; Mr. Walters was witnessed having several drinks prior to offending. In this case, the only "evidence" of drug use is Mr. McBride's claim that he did so; no one witnessed him taking drugs and there was no testimony or evidence presented as to his demeanor at the time of the arson, nor as to when he may have taken the fentanyl (was it before or after the arson). Mr. McBride was arrested some time after the arson; there was no expert testimony as to the lingering effects of fentanyl. The Court of Appeal in *Walters* recognized that after a while the defendant had "begun to sober up some," and thus held that it was harmless error to not give the instruction as to his resisting arrest and assault convictions. *Walters* at 84-85. And, even if Mr. McBride were under the influence, "[a] person can be intoxicated and still be able to form the requisite mental state, . . ." *Kruger* at 692.

Thus, the Court of Appeals was correct in its opinion below when it held:

> While there was testimony that McBride claimed to have burned the truck to stop imaginary beings, that he passed out, and that he was difficult to subdue, there was no evidence that fentanyl use causes their behavior or that fentanyl use would negate McBride's ability to form the required mental state for arson in the second degree. Therefore, there was not substantial evidence establishing a reasonable and logical connection between McBride's ingestion of fentanyl and the inability to form intent. *Accordingly, he has not shown that he was entitled to a voluntary intoxication jury instruction, which is required to establish deficient performance.*

Court or Appeals opinion, p. 5 (citation omitted) (emphasis added).

Petitioner has failed to show that the petition should be granted based on RAP 13.4(b)(2). The Court of Appeals decision in this case is not in conflict with either *Kruger* or *Walters.* Thus, there was neither deficient performance nor prejudice.

The petition should be denied on this ground.

c. This Court should decline to accept review because this petition does not present a significant question of law under the state or federal constitution.

Petitioner claims that this case presents a significant question of law under either the state or federal constitution under RAP 13.4(b)(3). While the issues of ineffective assistance of counsel and possible prejudice to a defendant implicate the constitution, as applied to this case they do not present a *significant* question. As has been demonstrated herein, the question of voluntary intoxication and the right to an instruction on the issue, whether it be for alcohol or drugs, has been extensively litigated and the law is well settled.

The petition should be denied on this ground.

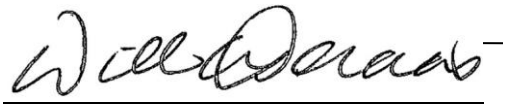
CONCLUSION

The petition satisfies neither RAP 23.4(b)(2) nor 13.4(b)(3). For all the reasons set forth herein the petition should be denied.

This document contains 4007 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 3rd day of September, 2024.

Respectfully Submitted,



WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA # 15489

WAL /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

September 03, 2024 - 8:24 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,241-2
Appellate Court Case Title:	State of Washington v. Robert Blain McBride
Superior Court Case Number:	22-1-00119-7

The following documents have been uploaded:

- 1032412_Other_20240903081848SC526194_8923.pdf
  This File Contains:
  Other - States Answer to Petition for Review
  The Original File Name was STATES ANSWER TO PETITION FOR REVIEW RE MCBRIDE.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- appeals@graysharbor.us
- glinskilaw@wavecable.com
- ntillotson@graysharbor.us

Comments:

Sender Name: Laura Harwick - Email: lharwick@co.grays-harbor.wa.us
Filing on Behalf of: William Anton Leraas - Email: wleraas@graysharbor.us (Alternate Email:)

Address:
102 West Broadway #102
Montesano, WA, 98563
Phone: (360) 249-3951 EXT 1619

Note: The Filing Id is 20240903081848SC526194